ARGUMENT

The BIA committed abuse of discretion, tantamount to lack of , or in excess, of jurisdiction, so far as it denied Petitioner's motion to reopen his immigration case, since the reason given by the Immigration Judge was not a *reason* for denying a motion for 3rd continuance, but merely a statement of the obvious : that the labor department had not yet acted on his labor certification application.

The denial of a motion to reopen is subject to an abuse of discretion standard of review. *INS v. Doherty, 502, U.S. 314, 317 (1992); Bolshakov v. INS, 133 F.3d. 1279, 1281 (9th Cir. 1998); Hernandez-Vivas v. INS, 23 F.3d 1557, 1560 (9th Cir. 1994).* Standard of evidence for denial of a Motion to Reopen is abuse of discretion. *Feleke v. INS, 118 F.3d 594; 597-598 (8th Cir. 1997); Nativi-Gomez v. JA, CA No. 02-3356 (8th Cir. 9/26/03.*

The phrase "abuse of discretion amounting to lack or excess of jurisdiction" has settled meaning in the jurisprudence of procedure. It means such capricious and whimsical exercise of judgment by the tribunal exercising judicial or quasi-judicial power as to amount to lack of power. It is used by a court of appeals to reverse the trial court judgment because the judge's actions were so far out of bounds that someone did not receive a fair trial. For example, an abuse of discretion may exist if a judge does not allow a witness to testify that has important information, or if the

judge issues rulings on evidence that denies a person the chance to explain his side of the matter. The abuse of discretion rule does not require the judge to be perfect, but the judge's actions should not be so far out of bounds that a fair trial did not take place. The appeals court may find that the original judge was incorrect, but not enough to have influenced the trial's outcome.

In the case at bar, the 90-day limitation for filing a motion to reopen should have been subject to equitable tolling based on the unique circumstances surrounding the instant case. In Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001)(*en banc*), the court held that equitable tolling is available "in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of a claim." *id* at 1193. The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking the tolling need only show that this or her ignorance of the limitation period was caused by circumstances beyond the party's control." *Id.*

There is no cavil of any doubt that Petitioner had filed said application for Labor Certification, which is now pending adjudication by the Department of Labor. Petitioner submits that, during the hearing of his removal case before the Immigration Judge, he was not given sufficient time to offer in evidence proof of the filing thereof. The BIA also failed to take quasi-judicial notice of the fact that the Labor Department's District Office in New Jersey, wherein subject

application had been filed, takes years to issue Receipt Notices, much less to adjudicate the same . So much so, that during the master calendar hearing before the Immigration Judge, Petitioner did not bring with him any proof of receipt by the Department of Labor of his application. Moreover, it cannot be gainsaid that respondent is eligible for adjustment of status, since he had filed subject application for Labor Certification prior to the deadline for filing said documents and, immediately before INA §245(i) had expired. Petitioner contends that had he been granted a continuance by the Immigration Judge to present further proof of his eligibility to stay in the country, he would not be ordered removed. As such, his failure to lay down all possible defenses to protect his interest, constituted a violation of the elements of fair play in administrative law, and deprived Petitioner of his day in court.

Petitioner further contends that the Immigration Judge's denial of his motion for continuance is arbitrary, considering that the reason given was not a *reason* for denying said motion, but merely a statement of the obvious: that the labor department had not yet acted. If the IJ had stated that Petitioner had dragged his feet, or that he had no employment skills, or that his application of labor certification was not filed before the expiry date of Section 245(i), or that he was a danger to the security of the US, the denial of his motion for continuance would be deemed reasoned.

In the parallel case of *Subhan v. Ashcroft*, CA No. 03-3869 (7th Cir. Sept. 7, 2004), the court struck down the IJ's denial of Petitioner's motion for continuance as being arbitrary. In that case, the petitioner requested for continuance of 6 months, since he has not yet obtained his

labor certification. The IJ granted his request. At the end of 6 months, not having obtained his labor certification, he again requested for continuance for another 6 months, and was granted. Through no laxity or other fault on his part, the labor departments still did not act on his application within the further 6-month period. When the petitioner applied for a third continuance, the IJ denied his motion, the reason being that the labor departments had not yet acted on his certification.

In the instant case, during a Master Calendar Hearing before the Immigration Judge, petitioner admitted the factual allegations in said Notice to Appear, but MOVED FOR CONTINUANCE, on the ground that Petitioner had a Labor Certification Application pending, which was filed prior to April 30, 2001, the expiry date of Section 245 (i) of the Immigration and Nationality Act. (To date, the New Jersey Labor Department has not yet acknowledged receipt of said labor certification application, since it has not issued a Receipt Notice to petitioner).

Petitioner also moved the Immigration Judge for the alternative relief of voluntary departure.

After hearing on the merits, the immigration judge denied Petitioner's aforesaid motion for continuance, but granted the relief of voluntary departure effective up to December 11, 2001. On appeal, the Board of Immigration Appeals (BIA) affirmed the judge's decision, stating that "respondent has not shown that the Immigration Judge's denial of his motion for a continuance either denied him a full and fair hearing or resulted in prejudicial harm," and that petitioner "has not submitted any evidence of his

eligibility for that relief of adjustment of status under section 245(i) of the INA".

Petitioner was supposed to leave the United States on September 27, 2003, pursuant to the BIA's affirmance order, but failed however to depart on that date, and continues to be present in the country, while awaiting adjudication by the Department of Labor of his pending Labor Certification Application. In his plea for continuance before the Immigration Judge, Petitioner argued that he filed a Labor Certification Application prior to April 30, 2001, the sunset date of INA §245(i). Nevertheless, as earlier stated, the Immigration Judge denied said request allegedly since petitioner failed to present evidence of said filing.

On March 23, 2004, Petitioner filed a Motion to Re-open with the BIA, asserting, among others, the fact that, had his motion for continuance been granted, petitioner would have sufficient time to offer proof of the filing of his Labor Certification Application, which is the basis of his requested relief for adjustment of status.

Additionally, Petitioner contended that he was not given a genuine opportunity to present any documentation in support of his position that a Labor Certification had been filed, considering that the BIA did not take administrative notice of the fact that the New Jersey region delays in issuing a Receipt Notice for pending labor certification applications.

Moreover, Petitioner alleged that he was denied due process of law under Fourteenth Amendment, since the

immigration judge had denied his motion for continuance at the preliminary stage of the hearing, *e.g.* during the master calendar hearing, and did not afford petitioner the right to present rebuttal evidence in court at the appropriate time for him to do so.

The BIA, however, in a decision rendered on May 17, 2004, denied Petitioner's motion to reopen, saying that the same was allegedly filed out of time.

Granting of "continuances" in removal hearings to accommodate aliens who are eligible to adjust status, but cannot prove their eligibility, through no fault of their own, due to the fact that their labor certifications have not yet been processed and approved by the Labor Department, should have been the general rule, more than the exception. Since it were not so, the IJ has therefore committed abuse of discretion, and the Third Circuit should have reversed the BIA's adverse decision against Petitioner.

CONCLUSION

In the light of the foregoing, the decision of the Third Circuit must be reversed, recalled, or set aside, on the grounds that it is not in conformity with the other circuit court rulings on the same subject matter, and constitutes a deprivation of Petitioner's liberty interest to file for adjustment of status.

September 7, 2005

EPRHAIM TAHIR MELLA, ESQ.
Counsel for Petitioner

APPENDIX A
Order of the US Court of Appeals 3rd Cir. Denying the Petition for Review
Dated May 2, 2005

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2708

LUIS A. ZHININ
Petitioner

v.

John Ashcroft, ATTORNEY GENERAL
UNITED STATES OF AMERICA
Respondent

On Appeal from the Board of Immigration Appeals
(No. A74-834-526)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge,
SLOVITER, NYGAARD, ALITO ROTH, MCKEE,
BARRY, AMBRO, SMITH, FUENTES, and
VAN ANTWERPEN, Circuit Judges[1]

---

[1] Judge Richard L. Nygaard assumed senior status on July 9, 2005.

The Petition for rehearing filed by the Appellant in the above-entitled matter having been submitted to the judges who participated in the decision of this court and to all other available circuit judges who participated in the decision of the court and all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ Richard L. Nygaard

United States Circuit Judge

DATE: August 11, 2005
CLC\cc: Ephraim T. Mella, Esq.
Barry J. Pettinato, Esq.

APPENDIX B
Decision of the US Court of Appeals 3rd Cir. Denying the Petition for Rehearing
Dated August 11, 2005

THE UNITED STATES OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2708

LUIS A. ZHININ
Petitioner,

v.

ALBERTO R. GONZALES,* Attorney General,
Respondent.

Petition for Review
of the Board of Immigration Appeals
(Agency No. A74 834 526

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 2, 2005

Before: AMBRO, VAN ANTWERPEN, and TASHIMA,
** Circuit Judges

ORDER

Respondent's motion for summary affirmance of the May 17, 2004, decision of the Board of Immigration Appeals (BIA) is granted.

Summary affirmance is appropriate where, *inter alia,* "it clearly appears that no substantial question is presented..:Third Cir. I.O.P. 10.6. *See also Williams v. Chrans*, 42 F.3d 1137 (7th Cir. 1994)(per curiam)("Summary disposition is appropriate.. 'when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.'" (quoting *Joshua v. United States*, 17 F.3d378, 380 (Fed. Cir. 1993))); *United States v. Hooten,* 693 F.2d857,858 (9th Cir. 1982)(per curiam)(stating that motion to affirm should be filed only where "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument").

On August 28, 2003, the BIA summarily affirmed the immigration judge's final order of removal. Petitioner did not seek judicial review of that order. On April 27, 2004, petitioner filed a motion to reopen. Such a motion must be filed no later than 90 days after the date of the decision.[2] *See* 8 C.F.R § 1003.2 © (2). Thus, in this case, the motion was due to be filed not later than November 26, 2003. The motion, however, was not filed until April 7, 2004, more than four months after the 900day deadline. It is clear that the BIA did not abuse its discretion in denying the motion to reopen.

[2] Petitioner is, thus, mistaken in his belief that there is a "180-day reglementary [sic] period for said filing" which "has not yet lapsed." Moreover, as indicated below, even a 180-day period would have lapsed before petitioner's April 7, 2004, filing.

See Savion v. Ashcroft, 290 F.3d 166, 170 (3d Cir. 2002); Taniguchi v. Schlutz, 303 F.3d 950, 955 (9th Cir. 2002). Under these circumstances we grant the motion for summary affirmance and deny the petition for review.[3]

Petition for review is **DENIED**.

BY THE COURT

/s/ A. Wallace Tashima
Sr. United States Circuit Judge

Dated: May 2, 2005
CLC\cc: Ephraim T. Mella, Esq.
Barry J. Pettinato, Esq.

[3] Moreover, because petitioner did not file a petition for review of the order of removal, that decision cannot be reviewed under this petition for review. See Prekaj v. INS, 384 F.3d 265, 267-68 (6th Cir. 2004)

APPENDIX C
Decision of the Board of Immigration Appeals
Dated August 28, 2003; May 17, 2004

US Department of Justice

Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Mella, Tahir, Esq.
1822 Spring Garden St.
Philadelphia, PA 19130

Office of Chief Counsel-
970 Broad Street-Room1104B
Newark, NJ 07102

Name: ZHININ, LUIS A. A74-834-526

Date of this notice:
05/17/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
GRANT, EDWARD R.

U.S. Department of Justice
Executive Office for Immigration
Board of Immigration Appeals
Office of the Clerk

Falls Church, Virginia 22041

File: A74-834-526 – Newark Date

In re: LUIS A. ZHININ May 17, 2004

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Tahir Mella, Esquire

ORDER:

PER CURIAM. The motion to reopen has been filed out of time and will be denied. The final order in these proceedings was entered by the Board on August 28, 2003. Pursuant to 8 C.F.R. § 1003.2 © (2) (with certain exceptions not pertinent here), a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant case, a motion to reopen would have been due on or before November 26, 2003. The record reflects, however, that the Board did not receive the motion until April 7, 2004. The motion to reopen was therefore filed out of time. Accordingly, the motion to reopen is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Mella, Tahir, Esq.	Office of the District Counsel
1822 Spring Garden St	P.O. Box 1085
Philadelphia, PA 19130	Newark, NJ 07101-1085

Name: ZHININ, LUIS A. A74-834-526

Date of this notice: 08/28/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:

COLE, PATRICIA A.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A74 834 526 – Newark Date

In re: LUIS A ZHININ August 28, 2003

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tahir Mella, Esquire

ON BEHALF OF DHS: Charles Parker, Jr
District Counsel

CHARGE:

Notice: Sec. 212 (a) (6) (A) (I), I&N Act [8 U.S.C.§ 1182(a)(6)(A)(I)] – Present without being admitted or paroled

APPLICATION: Continuance, voluntary departure

We affirm the decision of the Immigration Judge and will dismiss the appeal. *See Matter of Burbano*, 201&N Dec.872 (BIA 1994)(noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with

those the Immigration Judge articulated in his or her decision"). The respondent has not shown that the Immigration Judge's denial of his motion for a continuance either denied him a full and fair hearing or resulted in prejudicial harm. *See Matter of Perez-Andrade,* 19 I&N Dec. 433, 434 (BIA 1987) (holding that a decision to deny a motion for a continuance will not be overturned on appeal unless the respondent was denied a full and fair hearing and was prejudiced as a result of the denial of his motion). Although the respondent alleges that he is eligible for adjustment of status under section 245 (I) of the Immigration and Nationality Act, 8 U.S.C § 1255 (I), he has not submitted any evidence of his eligibility for that relief. Furthermore, we find that the Immigration Judge did not err in imposing a § 400 voluntary departure bond pursuant to 8 C.F.R § 1240/26 © (3), and that the bond was required to "be posted".. within 5 business days of the immigration judge's order granting voluntary departure." 8 C.F.R § 1240/26 © (3). We will, however, extend the Immigration Judge's grant of voluntary departure because there is no evidence in the record that the respondent's voluntary departure bond was no timely posted.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. See section 240B(b) of the

Immigration and Nationality Act; 8 C.F.R. §§ 1240.26 (c), (f). In the event the respondent fails to do so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the district director, the respondent shall be the subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B (d) of the Act.

FOR THE BOARD

APPENDIX D
Immigration Judge's Decision
Dated October 11, 2001

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Newark, New Jersey

File No.: A 74 834 526 October 11, 2001

In the matter of

LUIS ZHININ, IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE:

APPLICATION:

ON BEHALF OF MR. ZHININ: ON BEHALF OF
Tahir Mella, Esquire THE SERVICE
Lisa M. Golub, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent was placed under removal proceedings by the issuance of the Notice to Appear dated May 10, 2001, see Exhibit 1. The respondent admitted the factual allegations of four, five, and seven,

and conceded by the respondent, I do find that removability has been sustained in this case.

Having conceded that he is removable from the United States, the respondent is seeking the relief of voluntary departure in this case. S well the respondent is seeking an adjournment of some eight to nine months in order to pursue a labor certification approval as well as a petition for I-140. Firstly, this Court would note that absolutely nothing has been provided to this Court regarding those applications that the respondent allegedly has filed with the Immigration and Naturalization Service, in this case. In addition, regardless, an adjournment of that magnitude for a relief that may or may not be available to the respondent certainly is not a reasonable basis for an adjournment request to this Court, and this Court denies the same.

The following orders will issue:

ORDER

IT IS ORDERED that the application for adjustment of these proceedings for a period of eight to nine months by the respondent is hereby DENIED. The application for voluntary departure pursuant to Section 240B of the Acts is granted for a period of 60 days , that is on or before December 11, 2001. This is without expense to the Government. And in addition, this Court is hereby setting a bond of $500 to ensure the respondent's timely departure from the United States.

IT IS FURTHER ORDERED that if the respondent fails to post the bond within the five business days required by the statute, or if the respondent fails to leave

the country by the date specified, the above order will be withdrawn without any further notice or proceedings, and the following orders shall thereupon become immediately effective. The respondent shall be removed from the United States to Ecuador pursuant to the charge contained in the Notice to Appear.

NICOLE KIM
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before Nicole Kim, in the matter of:

LUIS ZHININ

A 74 834 526

Newark, New Jersey

was held as herein appears, and that this is the original transcript
thereof for the file of the Executive Office for Immigration Review

Charlene Williamson (Transcriber)

Deposition Services, Inc